

OCT 31 1983

ALEXANDER L. STEVAS,  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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No. 83-263

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RE: IN THE MATTER OF NORMAN E. FOGLE,  
Petitioner

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF SOUTH CAROLINA

---

RESPONDENT'S BRIEF IN OPPOSITION

---

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ATTORNEYS FOR RESPONDENT.

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## QUESTION INVOLVED

### I.

Should this Court issue a Writ of Certiorari where Petitioner has failed to demonstrate any conflict of decisions or the existence of an important federal question?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at \_\_\_ S.C. \_\_\_, 303 S.E.2d 90 (1983). The opinion delivered in the court below as well as prior orders of the court in this matter are fully set out in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

### STATE PROVISIONS INVOLVED

In addition to the provisions set forth in the Petition, pertinent portions of the Rule on Disciplinary Procedure of the South Carolina Supreme Court are set out in the Respondent's Appendix at 1a.

### QUESTION INVOLVED

Should this Court issue a Writ of Certiorari where Petitioner has failed to demonstrate any conflict of decisions or the existence of an important federal question?

### STATEMENT OF THE CASE

The Petitioner is a licensed attorney in South Carolina, having been admitted to the bar in 1962. From January, 1973, until April 7, 1983, Petitioner served as the duly elected state prosecuting attorney (Solicitor) for the First Judicial Circuit, composed

of Calhoun, Dorchester and Orangeburg Counties. On June 17, 1982, Petitioner submitted an Application for Disability Retirement to the South Carolina Supreme Court under the provisions of Section 9-8-10, et seq., of the South Carolina Code of Laws (1976), as amended by Act 150 of 1979, which provides a retirement system for judges and solicitors. In support of his application, Petitioner submitted medical reports from three physicians indicating that Petitioner suffered from persistent chronic prostatitis, chronic urinary tract infection, and psychiatric distress due to his prostatitis and urinary tract problems as well as the heavy mental stress of his position as Solicitor. The doctors were of the opinion that Petitioner was permanently and totally disabled from a physical and mental



standpoint and should be permitted to retire.

On July 15, 1982, the South Carolina Supreme Court appointed a medical panel of physicians from the Medical University of South Carolina to examine Petitioner and to determine if he was totally and permanently disabled (Appendix at 8a). On August 2, 1982, the Panel submitted its Report to the Court finding that Petitioner suffered from chronic prostatitis of a debilitating nature, chronic glomerulonephritis, and chronic anxiety and depression. The Panel was of the opinion that Petitioner was totally, although not necessarily permanently, disabled. Since Section 9-8-60 (3) of the South Carolina Code of Laws (1976), as amended, required that the member must be both totally and permanently disabled, Petitioner requested and was

granted an extension of time to submit additional medical evidence and reports to the medical panel. On January 31, 1983, a majority of the Panel rendered a supplemental report finding Petitioner totally and permanently disabled.

On March 21, 1983, a hearing was held before the Supreme Court of South Carolina to receive oral arguments on the issue of whether Petitioner was totally and permanently disabled. On April 7, 1983, the Court issued its Order finding Petitioner totally and permanently disabled from rendering useful and efficient service in his position as Solicitor (Petitioner's Appendix at 12).

On the same day, the Court issued an Order and Rule to Show Cause to Petitioner as to why he should not be

indefinitely suspended from the practice of law (Petitioner's Appendix at 14-15). This Order was issued pursuant to Section 19 of the South Carolina Supreme Court's Rule on Disciplinary Procedure (Appendix at 1a), which provides that an attorney who has been judicially declared mentally or physically incompetent or incapacitated shall be transferred for an indefinite period to the disability inactive status. The Petitioner did not submit any further evidence or a brief to the Court, and, after hearing arguments from Petitioner on May 2, 1983, the Court issued its Order, dated May 5, 1983, indefinitely suspending Petitioner from the practice of law (Petitioner's Appendix at 19-20). On May 9, 1983, the Petitioner filed a Petition requesting a rehearing before

the South Carolina Supreme Court on the ground that the Court should merely place limitations on Respondent's practice of law rather than suspending him (Petitioner's Appendix at 21-22). On May 19, 1983, the Court denied the Petition for Rehearing (Petitioner's Appendix at 23-24).

#### ARGUMENT

##### I.

Petitioner has failed to demonstrate any reason why the Court should grant review on certiorari.

##### A. No Conflict in Decisions.

It is noteworthy that the Petition fails to cite any case which conflicts with the decision below. Clearly, Petitioner does not come within Rule 17.1(a) or (b) of the United States Supreme Court Rules as an appropriate reason to grant certiorari.

B. Lack of Important Federal Questions.

Petitioner has failed to comply with Rule 21.1 (h) of the United States Supreme Court Rules in that he has failed in his Statement of the Case to specify: the stage of the proceeding at which federal questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court below. A cursory review of the Lower Court's Opinion reveals, moreover, that the court below did not pass upon any federal questions.

The Petitioner seeks review by this Court of a state law decision by attaching the constitutional labels of "equal protection" and "due process of law" to some of the questions presented in his Petition. However, Petitioner

fails to adequately explain, much less to establish, how important federal questions are presented in this case.

The action taken by the South Carolina Supreme Court was pursuant to that Court's Rule on Disciplinary Procedure. Section 19A (Appendix at 1a) provides that where an attorney has been judicially declared incompetent or physically disabled, the Court, upon proper proof of the fact, shall enter an Order transferring the attorney indefinitely to the disability inactive status. If there has been no judicial declaration, then the Court may direct the examination of the attorney by medical experts, and if, after due consideration, the Court concludes that the attorney is incapacitated, the Court shall then transfer him to the inactive status. The procedure of Rule 19 was

fully complied with in the proceeding below.

Questions I and IV of the Petition present no federal question but rather merely raise matters of state law. This Court has long recognized that the right to control the practice of law in the state courts is vested in the states. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 21 L.Ed.442 (1873); Ex Parte Lockwood, 154 U.S. 116, 14 S.Ct. 1082, 38 L.Ed. 929 (1894). State courts have broad powers to establish standards for licensing practitioners and regulating the practice of the profession. Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). Petitioner in his Questions I and IV, merely challenges the factual determination of the South Carolina Supreme Court that he was physically

and mentally incapacitated under the standards it imposes for the practice of law in South Carolina. This Court is without jurisdiction to review these state law questions under 28 U.S.C. § 1257 (3).

In Questions II, III and V, the Petitioner attempts to raise equal protection and due process issues. The record amply establishes that Petitioner was afforded the same procedures provided to all attorneys in cases involving mental or physical disability under Section 19 of the Rule on Disciplinary Procedure. The South Carolina Supreme Court had before it the medical reports submitted by the Petitioner and by the medical panel appointed by the Court in the prior retirement proceeding. Petitioner never challenged any of these medical



opinions. With this information before it, the Court could properly determine if these disabilities also rendered Petitioner incapable of practicing law. Petitioner was afforded by the Court's Order and Rule to Show Cause dated April 7, 1983, with both notice and a hearing on the issue of his mental and physical incapacity to practice law. Petitioner did not submit any new or additional evidence for the Court's consideration. It is obvious that Petitioner raises the federal issues merely in an attempt to obtain the jurisdiction of this Court to review the State Court's decision. It is noteworthy that none of the so-called "federal questions" were raised by Petitioner in his request for rehearing before the State Court (Petitioner's Appendix at 21-22). It would seem that if Petitioner deemed these questions

important, then they should have been properly presented, briefed, and argued below so that the State Court could possibly construe its rule to avoid or obviate the federal constitutional challenges. Petitioner's failure to do so, not only demonstrates that the questions are not important or substantial, but also that this record is not an appropriate vehicle to address the State's authority in regulating the practice of law before the State courts.

#### CONCLUSION

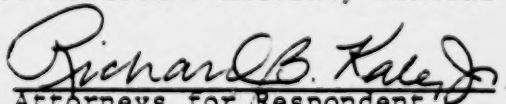
For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK  
Attorney General

RICHARD B. KALE, JR.  
Senior Assistant Attorney General

BY:

  
Attorneys for Respondent

APPENDIX

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RULE ON DISCIPLINARY PROCEDURE

19. PROCEEDINGS WHERE AN ATTORNEY IS  
DECLARED TO BE MENTALLY OR  
PHYSICALLY INCOMPETENT OR IS  
ALLOWED TO BE INCAPACITATED

A. Where an attorney has been judicially declared incompetent or is involuntarily committed on the grounds of mental incompetency or physical disability, the Court, upon proper proof of the fact, shall enter an Order transferring the attorney to disability inactive status effective immediately and for an indefinite period until the further Order of the Court. A copy of the Order shall be served upon the attorney, his guardian, and/or the director of the institution to which he has been committed in the manner as the Court may direct.

B. Whenever the Board or Executive Committee through the Chairman shall petition this Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, the Court may take or direct action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by qualified medical experts as the Court shall designate. If, upon due consideration of the matter, the Court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an Order transferring him to disability inactive status on the grounds of the disability for an indefinite period and until the further Order of the Court. Any pending

disciplinary proceedings against the attorney shall be held in abeyance.

The Court shall provide for such notice to the Respondent of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the Respondent if he is without adequate representation.

C. If, during the course of a disciplinary proceeding, the Respondent contends that he is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the Respondent to adequately defend himself, the Court thereupon shall enter an Order immediately transferring the Respondent to disability inactive status until a determination is made of the Respondent's capacity to continue to practice law in a proceeding instituted

in accordance with paragraph 19B of this Rule.

If the Court shall determine that the Respondent is not incapacitated from practicing law, it shall take action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the Respondent.

D. The Board shall cause a notice of transfer to disability inactive status to be published in the "Transcript" or similar Bar publication and the Board shall similarly cause notice of reinstatement to be published.

E. The Board shall promptly transmit a certified copy of the Order of transfer to disability inactive status to the chief judge of the judicial circuit in which the disabled attorney maintained his practice and shall request action under the provision

of paragraph 33 of this Rule as may be indicated in order to protect the interests of the disabled attorney and his clients.

F. No attorney transferred to disability inactive status under the provisions of this Rule may resume active status until reinstated by Order of this Court. Any attorney transferred to disability inactive status under the provisions of this Rule shall be entitled to petition for reinstatement to active status once a year. The petition shall be granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and he is fit to resume the practice of law. Upon the application, the Court may take or direct action as it deems necessary or proper to a determination of whether the



attorney's disability has been removed, including a direction for an examination of the attorney by qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of the examination be paid by the attorney.

G. If an attorney has been transferred to disability inactive status by an Order in accordance with paragraph C above, and thereafter in proceedings duly taken, he has been judicially declared to be competent, this Court may dispense with further evidence that his disability has been removed and may direct his reinstatement to active status upon terms as are deemed proper and advisable.

H. The filing of a petition for reinstatement to active status by an attorney transferred to disability inactive status or any other petition or

motion based upon a mental or medical condition shall constitute consent to divulge his medical records. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since his transfer to disability inactive status and he shall furnish to this Court written consent to each to divulge such information and records as requested by Court appointed medical experts.

THE SUPREME COURT OF SOUTH CAROLINA

RE: THE HONORABLE NORMAN E. FOGLE  
SOLICITOR FOR THE FIRST JUDICIAL CIRCUIT

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O R D E R

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The Court being of the view that  
The Honorable Norman E. Fogle, Solicitor  
of the First Judicial Circuit, should  
submit to an examination prior to a  
determination as to whether or not he is  
totally and permanently disabled from  
rendering further useful and efficient  
service as a Solicitor,

IT IS, THEREFORE, ORDERED, that:  
Dr. William Turner, Dr. Arthur Williams,  
and Dr. Thomas Steele, all of the  
Medical University of South Carolina, be

and they are hereby, appointed as a panel for the purpose of such examination and reporting their findings to this Court no later than August 15, 1982. Dr. Gilbert Bradham, Vice President for Clinical Affairs, is hereby designated as Chairman of this panel.

IT IS THE FURTHER ORDER of this Court that Solicitor Fogle contact the Chairman of the panel at the Medical University of South Carolina, Charleston, South Carolina, to arrange to submit to such examination or examinations as directed by the Chairman and the members of the panel of physicians as hereinabove appointed.

AND IT IS SO ORDERED.

J. Woodrow Lewis, C.J.  
FOR THE COURT

Columbia, South Carolina  
July 15, 1982.